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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KENNETH BERRY, Defendant and Appellant.	B264757 (Los Angeles County Super. Ct. No. PA027446)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Reversed and remanded.

Joshua Schraer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Kenneth Berry was sentenced to an indeterminate life term under the "Three Strikes" law in 1998 after a jury convicted him of, inter alia, assault by means of force likely to produce great bodily injury and unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851. After enactment of Proposition 36, the Three Strikes Reform Act of 2012 (hereinafter the Act or Proposition 36), Berry petitioned for recall of his sentence and resentencing. The trial court denied the petition, finding that Berry was ineligible because he intended to, and did, cause great bodily injury during commission of the assault.

Berry argues that the trial court erred by (1) failing to consider his eligibility for resentencing on the Vehicle Code section 10851 conviction; (2) basing its finding that he intended to inflict great bodily injury during the assault on disputed facts not resolved by the jury; (3) finding he actually inflicted great bodily injury during the assault, despite the jury's contrary finding; and (4) applying a preponderance of the evidence standard when making the eligibility determination. Because Berry's first and fourth arguments have merit, we reverse the resentencing court's order and remand for a new resentencing hearing.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The commitment offenses*

a. *People's evidence*

As summarized in our opinion on Berry's direct appeal, the evidence offered at trial was sufficient to prove the following. In the early morning hours of June 17, 1997, Rene Dent was at her North Hills home with her 11-year-old daughter, Whitney. Dent and Berry had known each other for approximately 25 years, and

had been or were in a dating relationship. Just after midnight, Berry knocked on Dent's bedroom window and she let him in the house. He asked her for a check to repay money he had given or loaned her. Dent stated that she had no money. Berry kept asking for a check, and Dent asked him to leave.

Berry began searching the house for the presence of another man. When Dent attempted to call the police, Berry snatched the phone from her. He choked her with both hands and pushed her on the bed. Dent called out to Whitney, who told Dent to leave. Berry punched Dent in the face, knocking her to the floor. Then he repeatedly stomped on her head and torso with his boot. When Berry stopped kicking Dent, he stated, "I will kill you, bitch."

Berry then took Dent's car keys without her permission and drove away in her Honda Accord. When police apprehended him hours later, he said, "Man, I know I fucked up. I lost it. I went to her house, saw her with another guy. I got pissed and pushed her. I know I shouldn't have taken the car."

b. *Defense evidence*

Berry testified in his own behalf. He admitted going to Dent's house and choking her, but stopped when she said he was hurting her. Dent grabbed him and attempted to kick him. In response, Berry hit Dent, causing her to fall. He decided to take her car, but intended to return it. He ran out to the car, but then realized he did not have the keys. He returned to the house and stumbled over Dent, who was lying on the floor. He accidentally stepped on her face. He did not kick or stomp her.

2. *Verdict and sentence*

On March 31, 1998, the jury convicted Berry of assault by means of force likely to produce great bodily injury (Pen. Code,

former § 245, subd. (a)(1)),[1] unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)), and simple battery, a misdemeanor (§ 242). It acquitted Berry of robbery (§ 211), grand theft person (§ 487, subd. (c)), grand theft auto (§ 487, subd. (d)), and battery with serious bodily injury (§ 243, subd. (d)). The jury additionally found Berry had suffered two prior "strike" convictions and had served five prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court sentenced Berry to a term of 50 years to life, plus five years, configured as follows: on count 1, assault by means of force likely to produce great bodily injury, 25 years to life pursuant to the Three Strikes law; on count 4, unlawfully driving or taking a vehicle, a consecutive term of 25 years to life; and for each of the five section 667.5 prior prison term enhancements, one additional year. Sentence on count 6, simple battery, was stayed pursuant to section 654. We affirmed the judgment. (*People v. Berry* (Aug. 5, 1999, B122476) [nonpub. opn.].)[2]

3. *Petition for resentencing and appeal*

On November 6, 2012, the electorate passed Proposition 36. (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 788.) As discussed more fully *post,* Proposition 36 enacted section 1170.126, which provides that eligible persons currently serving indeterminate life terms under the Three Strikes law may file a

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[1] All further undesignated statutory references are to the Penal Code.

[2] We take judicial notice of the record in case No. B122476, including our unpublished opinion. (Evid. Code, §§ 459, subd. (a), 452, subd. (d).)

petition in the sentencing court seeking to be resentenced to a determinate term as a second striker. (§ 1170.126, subds. (b), (f); *People v. Brimmer, supra,* at p. 788.)

On March 20, 2014, Berry, who was represented by counsel, petitioned for resentencing on counts 1 and 4, the assault and Vehicle Code section 10851 offenses, respectively. He argued that he was eligible and resentencing would not pose an unreasonable risk of danger to public safety.[3] The People opposed the motion, arguing that Berry was ineligible because he intended to cause great bodily injury to Dent during the assault, and in any event resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) The trial court issued an order to show cause.

On April 28, 2015, the trial court conducted an eligibility hearing at which it reviewed portions of the trial record. Berry argued that his own testimony at trial indicated he did not intend to inflict injury, and other evidence on the question was conflicting. Further, Berry urged that the jury must have discredited portions of Whitney's and Dent's testimony because it acquitted him of battery with serious injury. The People argued the evidence of Dent's injuries and Berry's threat showed he did intend to inflict great bodily injury.

The trial court stated it did not give Berry's trial testimony "very much weight because he has a huge motive to lie." It found Dent also lied when she said she did not recall the attack. The court denied the petition on the ground that during the commission of the assault, Berry "intended to inflict, and did

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[3] Berry requested that he be resentenced to a total term of 14 years four months, with credit for time served of over 16 years.

inflict great bodily injury, making him ineligible" pursuant to section 1170.126(e)(2).[4]

The trial court did not separately rule on whether Berry was eligible for resentencing on the Vehicle Code section 10851 offense.

Berry filed a timely notice of appeal challenging the trial court's denial of his petition. (*Teal v. Superior Court* (2014) 60 Cal.4th 595.)

DISCUSSION

1. *The Act and the standard of review*

"Prior to its amendment by the Act, the Three Strikes law required that a defendant who had two or more prior convictions of violent or serious felonies receive a third strike sentence of a minimum of 25 years to life for any current felony conviction, even if the current offense was neither serious nor violent. [Citations.] The Act amended the Three Strikes law with respect to defendants whose current conviction is for a felony that is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current felony, pursuant to the provisions that apply when a defendant has one prior conviction for a serious or violent felony. [Citations.]" (*People v. Johnson* (2015) 61 Cal.4th 674, 680-681, fn. omitted; *People v. Conley* (2016) 63 Cal.4th 646, 651.)

The Act also enacted section 1170.126, which created a procedure by which eligible prisoners already serving third strike

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[4] The trial court stated it found Berry ineligible under section 1170.126, subdivision (e)(3). The court misspoke; it presumably intended to refer to subdivision (e)(2).

sentences may seek resentencing in accordance with the new sentencing rules.[5] (*People v. Johnson, supra,* 61 Cal.4th at p. 682; *People v. Conley, supra,* 63 Cal.4th at p. 653; *People v.*

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[5] Section 1170.126, subdivision (b) provides: "(b) Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section."

Subdivision (e) provides in pertinent part: "An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. [¶] (2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12."

Blakely (2014) 225 Cal.App.4th 1042, 1048.) An inmate is eligible for resentencing if he or she is serving an indeterminate term of life imprisonment imposed pursuant to the Three Strikes law for a conviction of a felony or felonies that are not defined as serious and/or violent. (§ 1170.126, subd. (e)(1); *People v. Johnson, supra,* at p. 682.) An inmate "is disqualified from resentencing if any of the exceptions set forth in section 667, subdivision (e)(2)(C) and section 1170.12, subdivision (c)(2)(C) are present." (*People v. Johnson, supra,* at p. 682.) The trial court may decline to resentence an eligible defendant if, in its discretion, it determines resentencing would pose an unreasonable danger to public safety. (§ 1170.126, subd. (f).)

We review "the factual basis of the trial court's finding under the familiar sufficiency of the evidence standard. 'We review the whole record in a light most favorable to the [order] to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense.' [Citations.]" (*People v. Guilford* (2014) 228 Cal.App.4th 651, 661.)

2. *The Vehicle Code section 10851 offense*

Unlawfully driving or taking a vehicle in violation of Vehicle Code section 10851 is not a serious or violent felony, absent circumstances not present here, such as the use of a firearm or infliction of great bodily injury in commission of the crime. (See §§ 667.5, subd. (c)(8); 1192.7, subd. (c)(8); see generally *People v. Johnson* (2016) 244 Cal.App.4th 384, 389.) The parties agree that the trial court erred by failing to consider Berry's section 1170.126 petition insofar as he sought resentencing on the Vehicle Code offense.

We agree. In *People v. Johnson, supra,* 61 Cal.4th 674, our Supreme Court held that an inmate is eligible for resentencing under section 1170.126 on a current conviction that is neither serious nor violent, even though he or she has another current conviction that is serious or violent. (*People v. Johnson*, at p. 679.) *Johnson* concluded that the Act "requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, an inmate may obtain resentencing with respect to a Three Strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third strike sentence of 25 years to life." (*Id.* at p. 688; see also *People v. Lynn* (2015) 242 Cal.App.4th 594, 598.)

Consistent with *Johnson,* Berry's eligibility for resentencing on the Vehicle Code offense must be considered regardless of whether he is eligible for resentencing on the assault conviction. Accordingly, we reverse the trial court's order and remand for a new resentencing hearing on the Vehicle Code section 10851 offense.

3. *The assault by means of force likely to produce great bodily injury offense*

A conviction for assault by means of force likely to produce great bodily injury may disqualify a defendant for resentencing if the defendant inflicted, or intended to inflict, great bodily injury during commission of the offense. First, an inmate is eligible for resentencing only if he is serving an indeterminate life term for a conviction of a felony that is *not* defined as serious and/or violent by section 667.5, subdivision (c) or section 1192.7, subdivision (c). (§ 1170.126, subd. (e)(1); *People v. Johnson, supra,* 244 Cal.App.4th at p. 387; *People v. White* (2016) 243 Cal.App.4th

1354, 1360.) An offense is a violent felony under section 667.5, subdivision (c)(8) if a great bodily injury enhancement is found true; it is a serious felony under section 1192.7 if the People plead and prove the defendant personally inflicted great bodily injury. (*People v. Johnson, supra,* at pp. 389-390.)

Second, even if the commitment offense does not qualify as a "strike," an inmate is disqualified from resentencing if, "[d]uring the commission of the current offense," he "intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii);[6] *People v. Guilford*, *supra*, 228 Cal.App.4th at p. 654.)

Berry argues the trial court's ineligibility finding on the assault conviction must be reversed for three reasons: (1) the jury's acquittal on the battery with serious injury charge precluded the court from finding he did, in fact, inflict great bodily injury; (2) the trial court erred by basing its finding that he intended to inflict great bodily injury on a disputed issue of fact not adjudicated by the jury below; and (3) in making the ineligibility finding, the court applied the wrong standard of proof.

a. *The offenses*

In order to consider Berry's contentions, we begin by examining the elements of the crimes with which he was charged. "A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) To prove simple battery,

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6 The relevant language in section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii) is identical. For ease of reference we hereinafter refer only to section 667.

the People must establish the defendant willfully and unlawfully touched another in a harmful or offensive manner. (CALCRIM No. 960; *People v. Chenelle* (2016) 4 Cal.App.5th 1255, 1263; *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1149.) Force against the person is enough; it need not be violent or severe or cause bodily harm. (*People v. Dealba, supra,* at p. 1149.) Battery is a general intent offense. (*In re B.L.* (2015) 239 Cal.App.4th 1491, 1495; *People v. Thomas* (1988) 206 Cal.App.3d 689, 694 ["a person need not have an intent to injure to commit a battery, but only the general intent to commit the act"].)

To prove battery with serious bodily injury (§ 243 subd. (d)), the People must additionally establish that the victim suffered serious bodily injury as a result of the force used. (CALCRIM No. 925; *People v. Wade* (2012) 204 Cal.App.4th 1142, 1147; *People v. Thomas, supra,* 206 Cal.App.3d at p. 694 ["felony battery is but a simple battery which results in serious bodily injury"].) For purposes of section 243, "serious bodily injury" has a specifically defined meaning: it includes, but is not limited to, a "loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." (*Id.*, subd. (f)(4); *People v. Johnson, supra,* 244 Cal.App.4th at p. 390; *People v. Wade, supra,* at pp. 1147-1148.) Like simple battery, battery with serious bodily injury is a general intent offense. (*People v. Lara* (1996) 44 Cal.App.4th 102, 108; *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1054 ["courts have concluded consistently that such felony battery is a general intent crime, requiring only an intent to do the assaultive act"].) Thus, intent to cause serious bodily injury is not an element of the offense. (See CALCRIM No. 925.)

Assault by means of force likely to produce great bodily injury requires proof the defendant willfully committed an act which by its nature would probably and directly result in injury to another, with knowledge of facts that would lead a reasonable person to realize a battery would directly, naturally, and probably result. (*People v. Williams* (2001) 26 Cal.4th 779, 788, 790; *People v. White* (2015) 241 Cal.App.4th 881, 884.) Actual injury is not an element. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028; *In re Jonathan R.* (2016) 3 Cal.App.5th 963, 974; *People v. Brown* (2012) 210 Cal.App.4th 1, 7.) Great bodily injury, as used in section 245, "means significant or substantial injury" (*People v. Brown*, *supra*, at p. 7), rather than injury that is insignificant, trivial, or moderate. (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.)

b. *The resentencing court's finding that Berry actually inflicted great bodily injury*

Berry contends that the trial court's finding he actually inflicted great bodily injury on Dent is precluded by the fact the jury acquitted him on count 5, battery with serious bodily injury. We held in *People v. Arevalo* (2016) 244 Cal.App.4th 836, 842, that a defendant's acquittal on an offense precludes a trial court from determining the defendant is ineligible for section 1170.126 resentencing based on that offense. There, a police officer found defendant Arevalo driving a stolen car with an unloaded revolver on the seat beside him. (*People v. Arevalo*, *supra*, at p. 842.) Arevalo was convicted in a bench trial of grand theft auto and driving a vehicle without the owner's consent. The trial court acquitted him of possession of a firearm by a felon and found an " 'armed with a firearm' " allegation not true. (*Id.* at p. 843.) Arevalo subsequently petitioned for resentencing pursuant to

section 1170.126, and the trial court found he was ineligible because he had been armed with a firearm during the auto theft offenses. (*People v. Arevalo*, *supra*, at pp. 841-842, 844.) We held that in light of the substantial amount of potential prison time at stake, the risk of potential error stemming from the summary and retrospective nature of the adjudication, the slight countervailing governmental interest (given the People's opportunity to provide new evidence at any subsequent dangerousness hearing), and in order to safeguard the intended parallel structure of the Act's prospective and retrospective portions, ineligibility must be proven beyond a reasonable doubt. (*Id.* at pp. 852-853, citing *People v. Johnson, supra,* 61 Cal.4th at pp. 686-687.) Consequently, we reasoned that Arevalo's "acquittal on the weapon possession charge, and the not-true finding on the allegation of being armed with a firearm, are preclusive of a determination that he is ineligible for resentencing consideration." (*People v. Arevalo*, *supra*, at p. 842.)

Here, the jury found Berry guilty of simple battery and acquitted him of battery with serious bodily injury. The only difference between the two crimes is that the latter requires the infliction of injury. The jury's verdicts indicate it found Berry did not succeed in inflicting serious bodily injury, as defined in section 243, subdivision (f), on Dent. *People v. Johnson, supra,* 244 Cal.App.4th 384, holds that for purposes of determining eligibility under section 1170.126, subdivision (e)(1), serious bodily injury as defined in section 243, subdivision (f), is the equivalent of "great bodily injury" as used in section 1192.7, subdivision (c)(8). (*People v. Johnson*, *supra*, at p. 387.) Section 12022.7 defines "great bodily injury' as " 'a significant or substantial physical injury.' " (*People v. Johnson, supra,* at

p. 390.) Thus, if "great bodily injury" for purposes of section 245, former subdivision (a)(1) and "serious bodily injury" as defined in section 243, subdivision (f)(4) are equivalents, the jury's acquittal of Berry would preclude the sentencing court from finding him ineligible on the ground he *actually* inflicted great bodily injury in commission of the assault. (*People v. Arevalo, supra,* 244 Cal.App.4th at p. 842.)

However, we need not reach this question. Even assuming arguendo the resentencing court erred, its finding that Berry actually inflicted great bodily injury is largely irrelevant. As we discuss in the next section, the court's conclusion that Berry *intended* to inflict such injury is also a disqualifying circumstance and was *not* precluded by the jury's verdicts.

c. *The trial court did not err by making a factual finding based on the record of conviction*

The jury's verdict on the simple battery charge indicates it found Berry willfully touched Dent in a harmful or offensive manner. Its verdict on the assault charge indicates it found the force used was *likely* to result in great bodily injury, that is, significant or substantial injury. The verdict on the battery with great bodily injury charge indicates the jury concluded the victim did not *actually* suffer serious bodily injury as specifically defined by section 243, subdivision (f)(4), but this does not preclude a finding beyond a reasonable doubt that Berry *intended* to cause Dent great bodily injury. As Berry acknowledges, the jury was not asked to, and did not, render a verdict on the question of whether he had the intent to inflict great bodily injury. Violation of section 243, subdivision (d), is a general intent crime and does not require as an element that the defendant intended to cause injury.

To determine whether a defendant meets the statutory eligibility requirements of the Act, a trial court examines relevant, reliable, admissible portions of the record of conviction to determine the existence or nonexistence of disqualifying factors. The appellate opinion constitutes a portion of the record of conviction that may be considered. (*People v. Johnson, supra* 244 Cal.App.4th at p. 390, fn. 6; *People v. Brimmer, supra,* 230 Cal.App.4th at pp. 800-801; *People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Guilford, supra,* 228 Cal.App.4th at pp. 659-660; *People v. Guerrero* (1988) 44 Cal.3d 343, 355.) Berry does not dispute that the trial court's inquiry was properly limited to the record of conviction.

Berry argues, however, that because the jury was not asked to make a finding on intent, and the trial evidence regarding his intent was in dispute, the resentencing court was precluded from weighing the trial evidence and evaluating witness credibility. He insists that the resentencing court erred by "making factual findings beyond those that establish the nature or basis of appellant's current conviction." In essence, Berry's argument is that the "intent to cause great bodily injury" ineligibility circumstance can be found to exist only when such intent was an element of the crime, was an allegation found true by the jury, or was undisputed at trial.

We disagree. Berry's argument would essentially impose a pleading and proof requirement on section 1170.126, subdivision (e)(2) eligibility determinations, an interpretation that has repeatedly been rejected by the appellate courts. (See, e.g., *People v. Arevalo, supra,* 244 Cal.App.4th at p. 847 ["courts addressing this issue have all held that the resentencing eligibility factors need not have been pled and proven to a trier of

fact"]; *People v. Guilford, supra,* 228 Cal.App.4th at p. 656 [pleading and proof requirement applicable to prospective portion of the Act does not apply to the retrospective part]; *People v. Brimmer, supra,* 230 Cal.App4th at p. 802.) "Instead, section 1170.126, subdivision (f) provides that, 'Upon receiving a petition for recall of sentence under this section, *the court* shall determine whether the petitioner satisfies the criteria in subdivision (e).' " (*People v. Guilford, supra,* at p. 657.)

By its terms, section 1170.126 necessitates a factual determination by the resentencing court as to whether Berry had the intent to inflict great bodily injury. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331 ["The statute calls for a factual determination by the trial court as to whether petitioner was armed with a deadly weapon 'during the commission' of the offense" (italics omitted].) As *Bradford* explained: "The eligibility criteria here refer to something that occurs '[d]uring the commission of the current offense,' that being 'the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.' (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) By referring to those facts attendant to commission of the actual offense, the express statutory language requires the trial court to make a factual determination that is not limited by a review of the particular statutory offenses and enhancements of which petitioner was convicted. Not only do the criteria at issue here not describe any particular offenses or enhancements, but the reference to an intent to cause great bodily injury does not clearly equate to the most common related enhancement, that being the infliction of great bodily injury." (*Id.* at p. 1332; *People v. Arevalo, supra,* 244 Cal.App.4th at p. 848; *People v. Frierson*

(2016) 1 Cal.App.5th 788, 792, review granted Oct. 19, 2016, S236728.)

People v. Guerrero, supra, 44 Cal.3d 343, and *People v. Wilson* (2013) 219 Cal.App.4th 500, cited by Berry, do not assist him. In *Guerrero,* our Supreme Court considered whether, when determining if a prior conviction qualified as a serious felony for purposes of a section 667 enhancement, a court was limited to matters necessarily established by the prior judgment of conviction. (*Guerrero, supra,* at p. 345.) *Guerrero* concluded that "in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction," but "*no further*." (*Id.* at pp. 345, 355.) Such a rule was fair and reasonable, *Guerrero* reasoned, because it "effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*Id.* at p. 355.) But a trial court does not "relitigate" the case by simply making a factual finding based upon the trial record. Consistent with *Guerrero,* the resentencing court here looked to the record of conviction, but no further, when making the eligibility determination. Because a court's determination of eligibility facts does not enhance the defendant's existing sentence, it does not implicate the constitutional concerns mentioned by *Guerrero.* (Cf. *People v. Bradford, supra,* 227 Cal.App.4th at p. 1334; *People v. Frierson, supra,* 1 Cal.App.5th at p. 793.)

People v. Wilson concerned "the scope of a court's power to *increase* a defendant's sentence based on the record of a prior conviction." (*People v. Wilson, supra,* 219 Cal.App.4th at p. 503, italics added.) There, the defendant had previously pleaded no contest to offenses related to drunk driving. Based on its

examination of the preliminary hearing transcript in the prior case, the trial court found the defendant had personally inflicted great bodily injury on the victims, making the offenses strikes. (*Id.* at pp. 503-504.) *Wilson* held the trial court erred. The defendant disputed the relevant facts of his conduct, and the court "could not have found the offense to be a strike without resolving this factual dispute." (*Id.* at p. 504.) By doing so, the trial court violated *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *People v. McGee* (2006) 38 Cal.4th 682. (*Wilson, supra,* at p. 504.) But here, the resentencing court's finding is not being used to increase Berry's sentence. "[T]here is no constitutional violation in considering facts not decided by a jury at a postconviction proceeding pursuant to section 1170.126." (*People v. Bradford, supra,* 227 Cal.App.4th at p. 1334; see *People v. Johnson, supra,* 244 Cal.App.4th at p. 390, fn. 6.)

d. *The standard of proof*

In supplemental briefing, Berry contends that the resentencing court erred by incorrectly applying a preponderance of the evidence standard to the ineligibility determination, rather than the beyond a reasonable doubt standard we held applicable in *People v. Arevalo, supra,* 244 Cal.App.4th at pp. 852-853.)

The court below did not specify whether it applied a preponderance of the evidence or a reasonable doubt standard to the eligibility determination. The People argue that because error is never presumed, we must assume the court used the reasonable doubt standard. (See *People v. Fedalizo* (2016) 246 Cal.App.4th 98, 105, fn. 4.) Further, they urge that Berry failed to request that the court apply a reasonable doubt standard, and therefore has forfeited his contention on appeal. But as Berry observes, at the time of the 2015 resentencing

hearing our *Arevalo* decision had not yet issued, and at least one court had held the preponderance of the evidence standard applied. (See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 [holding the correct standard of proof for resentencing eligibility determinations is preponderance of the evidence].) Under these circumstances, neither the forfeiture rule nor the usual presumption of correctness applies. (See *People v. Black* (2007) 41 Cal.4th 799, 810 [challenges to procedures are not forfeited when the law later changed unforeseeably].)

The People also contend that even if the court applied the less stringent preponderance standard, any error was harmless.[7] In support, they cite *People v. Barasa* (2002) 103 Cal.App.4th 287, 296-297.) But *Barasa* is inapposite. The court there held that, assuming a defendant "had been convicted with an incorrectly allocated burden of proof, in cases where there is uncontradicted evidence as to a point, there can be no prejudice . . . ." (*Ibid*.) Here, the evidence regarding intent was not undisputed.

Based on the record before us, we cannot determine whether the trial court applied the reasonable doubt or preponderance standard. Certainly, there was ample evidence

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7 The People also argue that our *Arevalo* opinion was wrongly decided, and invite us to revisit it. We observe that our colleagues in Division Four and Two have concluded, contrary to *Arevalo,* that the preponderance of the evidence standard applies, and our Supreme Court is currently considering the question. (*People v. Frierson, supra,* 1 Cal.App.5th at pp. 793-794; *People v. Newman* (2016) 2 Cal.App.5th 718, 728, review granted Nov. 22, 2016, S237491.) Pending further guidance from our Supreme Court, we decline the People's invitation to reconsider *Arevalo*.

from which it could have concluded, beyond a reasonable doubt, that Berry intended to inflict great bodily injury on Dent. Whitney testified that she observed Berry choke her mother; he also hit Dent with his hand, causing Dent to fall to the floor. Berry then repeatedly stomped on Dent's face, jaw, and rib cage with the heel of his thick-soled, army-style boot, as Dent lay prone on the floor. He then said, " 'I will kill you, bitch.' " Dent testified that after Barry choked and grabbed her, she did not remember what happened. When she awoke in the emergency room she had a "bad headache" and her face, side, and shoulders hurt. When she returned home she felt "terrible pain," causing her to return to the doctor within a week after the assault. The People introduced photographs of Dent's injuries, which showed she had a black eye and bruises, including on her back and neck. Los Angeles Police Department Officer Debellis testified that when he arrived at Dent's home shortly after the attack, Dent was shaking and crying and "appeared as if she wasn't altogether there." She had bruises on both sides of her face and her chest, and her mouth was bruised and bloody. The bruises on Dent's face bore a particular criss-cross pattern suggestive of boot prints.

From the foregoing evidence, the resentencing court could have concluded beyond a reasonable doubt that Berry intended to inflict great bodily injury on Dent, notwithstanding Berry's own testimony that he accidentally stepped on Dent's face. The intent to inflict great bodily injury "may be shown by, and inferred from, the circumstances surrounding the doing of the act itself." (*People v. Phillips* (1989) 208 Cal.App.3d 1120, 1124.) "[W]here one applies force to another in a manner reasonably certain to produce, and actually producing, great bodily injury, the requisite

intent can be presumed, since the intent with which an act is done may be inferred from the circumstances attending the act, including the manner in which the act was done and the means used." (*Ibid.*) Here, the jury found Berry's conduct was likely to produce great bodily injury. Stomping on a prone victim's face and torso with an army boot is, quite obviously, an act reasonably certain to produce injury; it is an eminently reasonable inference that one who engages in such actions intends to inflict great injury. Thus, it may well be, as the People suggest, that the resentencing court would have found Berry intended to inflict great bodily injury under a reasonable doubt standard.[8]

Nonetheless, Berry is entitled to a hearing at which the correct standard is applied. Given that this matter must be remanded in any event for consideration of resentencing on the Vehicle Code section 10851 conviction, the trial court can clarify which standard of proof it applied and, if necessary, can readily reconsider Berry's eligibility using the reasonable doubt standard. Accordingly, we reverse the trial court's order and remand for a further eligibility hearing on the assault conviction, as well as on the Vehicle Code section 10851 conviction.

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[8] As this is a factual issue for the trial court, we express no opinion on the question.

DISPOSITION

The order is reversed and the matter is remanded for further proceedings consistent with the opinions expressed herein.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

GOSWAMI, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.